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In confidence

Office of the Minister for Social Development and Employment
Office of the Minister of Health

Chair
Cabinet Social Wellbeing Committee

IMPLEMENTING THE COURT OF APPEAL JUDGMENT ON THE MEANS ASSESSMENT FOR LONG-TERM AGED RESIDENTIAL CARE

Proposal

- 1 This paper advises Cabinet of the process to implement the 2019 Court of Appeal decision on the financial means assessment (FMA) for the Residential Care Subsidy (RCS) and proposes:
 - that you confirm a strategy for MSD to implement the Court of Appeal decision retrospectively and process refunds to clients/ estates directly rather than through DHBs and rest home owners
 - amendments to the Residential Care and Disability Support Services Regulations 2018 and the Social Security Regulations 2018 to exempt retrospective payments from means testing for RCS and social security assistance for 12 months.

Relation to government priorities

- 2 This proposal is a one-off response to a Court of Appeal decision and requires decisions so that implementation of retrospective payments can commence.

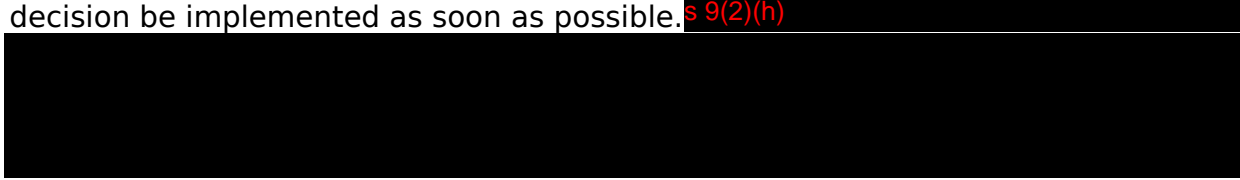
Executive summary

- 3 RCS policy and funding are the portfolio responsibility of the Minister of Health. The RCS is paid directly by District Health Boards (DHBs) to the hospital or rest home, and funded out of Vote Health. The Ministry of Social Development (MSD) undertakes the FMA.
- 4 In May 2019, the Court of Appeal found that some aspects of MSD's approach to carrying out the FMA were inconsistent with legislation. This was particularly in relation to the assessment of 'deprivation'.¹ This is where an applicant has 'deprived' themselves of assets or income.
- 5 Since December 2019, MSD has implemented a revised approach for new clients in line with the judgment, and has amended the review process for existing clients going forward. However, MSD is also required to apply the judgment retrospectively to historical means assessment decisions for clients.
- 6 MSD proposes to proactively contact approximately 2,100 clients and estates of deceased clients. We estimate that there may be 300 additional requests for

¹ The scope of the appeal meant the Court of Appeal was unable to resolve the amounts that should have been regarded as deprivation in the case. So, it referred the matter back to the Social Security Appeal Authority to determine.

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retrospective reviews. Retrospective payments arising from the reviews could cost up to \$20 million, dependent on the reviews' outcomes. This would place major pressures on DHBs' existing funding.

- 7 To avoid this impact on DHB funding, an initiative has been submitted for Budget 2021 seeking funding of \$20 million (\$5 million in this financial year (2020/21) and \$15 million in 2021/22). Should the initiative not be funded, then MSD and the Ministry of Health (MOH) would work to source alternative funding.
- 8 The initiative is proposed as a new appropriation in Vote Social Development, with the Minister of Health assigned as the appropriation Minister, which will enable MSD to make retrospective payments directly to clients/estates. This will get payments to clients promptly.
- 9 We are also proposing that retrospective payments arising from the reviews be exempted from means testing for RCS and various other forms of social security assistance for a 12-month period, consistent with comparable recent precedents where MSD has paid lump sum retrospective payments.
- 10 We consider it important that the response to historical cases arising from the decision be implemented as soon as possible. s 9(2)(h)

- 11 Dependent on the availability of Budget 2021 funding, MSD could begin contacting clients and estates of clients about the retrospective reviews in April 2021.

Background

- 12 RCS policy and funding are the portfolio responsibility of the Minister of Health and is funded by DHBs out of Vote Health. RCS is paid directly by DHBs to the hospital or rest home, and funded from general population-based funding under Vote Health.
- 13 MSD undertakes FMAs to determine how much a person will have to pay towards their residential care, and consequently how much (if any) support will be paid towards the cost of their care, which is met by DHBs.
- 14 During the FMA, MSD may identify historic or current acts where the applicant has 'deprived' themselves of assets or income (for example by gifting to a family trust above allowable thresholds), and may incorporate these into the means assessment as well.
- 15 In the Broadbent case (CA423/2017 [2019] NZCA 201), on 31 May 2019 the Court of Appeal found that some aspects of MSD's process for undertaking the FMA, particularly in relation to deprivation, were inconsistent with the legislation.
- 16 Key elements of the Court of Appeal's decision were that:
 - when an asset has been gifted by an applicant within the gifting threshold of \$27,000 a year (in the period up to five years prior to the application), any

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income capable of being generated from that asset should also be considered as gifted, and therefore should not be assessed as 'deprived' income as part of the FMA

- when exercising its discretion as to whether to include 'deprived' income or assets, MSD must consider whether financial resources are available to an applicant to help meet the cost of their care. If financial resources are not found to be available, deprived income or property cannot be included as part of the FMA.

17 The application of the judgment is beneficial to clients in some circumstances, particularly in relation to certain gifting practices concerning family trusts and other similar arrangements - compared to MSD's previous approach.

18 Further background on MSD's approach and the Broadbent decision is outlined in Appendix One.

MSD is applying the Court of Appeal's decision for new cases

19 MSD's initial priority was to implement the Court of Appeal's decision for new clients going forward. Since December 2019, MSD has implemented the judgment for new clients, and is also carrying out income reviews based on the judgment for existing clients going forward. Any changes to amounts payable arising from these income reviews only apply from the date of those reviews.

20 MSD estimates that between January and November 2020, 261 clients have paid less towards the cost of their care than they would have under MSD's initial application of the judgment. On this basis, we estimate that the application of the decision will increase the cost of RCS payments by around \$6.6 million a year. This cost is being met by DHBs from within their baselines.

s 9(2)(f)(iv)

21 s 9(2)(f)(iv)

Proposed strategy for implementing the Court of Appeal decision retrospectively

22 We propose that you confirm a strategy for implementing the Court of Appeal of decision. MSD will notify certain people that they can seek reviews of FMAs carried out prior to the date of the judgment:

- The group to be proactively contacted will comprise both current clients and the executors of estates of recently deceased clients who were in care at any time from the date of the original High Court judgment (June 2017) whose FMAs may have been affected by the Court of Appeal decision. This is because MSD has been 'on notice' that its approach may have been incorrect since the date of the High Court judgment.

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- The executors of estates of people potentially affected before June 2017 will also be able to request a review of their assessment, though MSD would not be proactively contacting this group.
 - Clients will receive retrospective lump sum refunds in cases where a review determines that a client has paid more towards the cost of their care than they should have based on the Court of Appeal decision.
- 23 In the first half of 2020, work on preparing for the retrospective reviews was delayed due to MSD resources being redirected to the COVID-19 response. Then further delays were caused by other factors such as the need for MSD to develop its approach to retrospective reviews.
- 24 Preparations for the reviews are nearly complete. The preparatory work has identified two issues that we either need to advise Cabinet on, or require Cabinet decisions for MSD to implement the Court judgment. The issues include:
- i. discussion of funding to cover the cost of retrospective payments arising from the reviews, and the creation of a new appropriation to enable refunds to be paid directly by MSD to clients/estates rather than via DHBs and rest homeowners
 - ii. exempting retrospective payments from means testing for the RCS and social security assistance for a period of 12 months.
- 25 We outline these issues below.

i) Funding for retrospective payments is currently being sought through an initiative for Budget 2021

- 26 An initiative for Budget 2021 has been submitted seeking \$20 million to meet the cost of retrospective payments.
- 27 The likely cost of the retrospective payments arising from the reviews is difficult to calculate and depends on several variables. However, based on the preparatory work already undertaken we estimate that the costs could be up to \$20 million.
- 28 Costings were developed based on a review of sample case files and applying costings to the estimated number of reviews to be carried out. They are also based on other assumptions - including that all those who are proactively contacted take up the opportunity to have a review. While it is unlikely that all these scenarios will be met in full, it is nonetheless prudent that funding decisions make provision for the estimated cost.
- 29 Without additional funding, DHBs would have to meet the costs of these retrospective payments from within their existing budgets. We do not consider this desirable, as it would mean that they would need to significantly reduce available funds for other health services. DHBs are already meeting the costs of applying the Court of Appeal decision in higher RCS payments for new cases going forward.

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To refund clients / estates more easily, a temporary payment channel will be created

- 30 Usually, the relevant DHB funds the residential care provider who then refunds RCS amounts to clients. However, we consider this funding route would be too protracted and unsatisfactory for making retrospective payments in the case of these retrospective reviews.
- 31 It would difficult to use the usual funding channel to pay retrospective payments to estates and family members where clients are long-deceased. For example, some rest homes have changed hands or ceased operations since 2017, so there would not be a clear avenue to make retrospective payments relating to former clients of those facilities.
- 32 Therefore, in the initiative for Budget 2021 a new non-departmental 'other expense' appropriation is proposed to be created in Vote Social Development to streamline the payment process. This is with the Minister of Health assigned as the appropriation Minister to reflect their responsibility for funding long-term aged residential care.
- 33 The creation of a new appropriation along these lines would ensure MSD could pay retrospective payments to clients/estates directly and efficiently, avoiding unnecessary steps and delays in the process.

Should the initiative for Budget 2021 not progress, alternative funding sources will be required

- 34 MSD and MOH are considering what alternative funding sources are available should the initiative for Budget 2021 not be funded.

Retrospective payments of other social security assistance will also need to be paid because of the reviews

- 35 Back-payments of certain other forms of social security assistance may need to be made to clients/couples (or their estates) in certain circumstances where a review finds that a client had been wrongly deemed ineligible for RCS when they originally applied. This is because entitlement to RCS affects clients' and/or their partners' entitlement to other social security assistance, or to higher rates of payment of benefits, in certain circumstances.
- 36 For example, if a client is eligible to receive RCS then they are also automatically eligible to receive the Clothing Allowance. This is an annual payment currently set at \$288.69 a year. Therefore, if the client was incorrectly declined previously then they would also be due Clothing Allowance back-payments.
- 37 Partners of residential care clients living in the community may also be due back-payments of certain other social security assistance in cases where the partner in residential care had been incorrectly denied previously, including the following:
 - **Special Disability Allowance (SDA)** - this is paid to partners in the community receiving a benefit or pension if they also have a partner in residential care receiving RCS (or a hospital rate of benefit in a hospital). This is currently set at \$40.77 per week. Therefore, if the partner in residential care was incorrectly declined RCS in the past, then the partner in the community may be due SDA back-payments.

- **Emergency Benefit (EB)** - this can be paid to a partner in the community who is not entitled to New Zealand Superannuation. The rate of payment for the partner in the community varies depending on their circumstances². If the partner in residential care was incorrectly declined RCS, the amount of income charged against the community-partner's EB may need to be adjusted. The community partner may be due back-payments where there had been income that should have been exempted from the income test for EB. Or their benefit may have been cancelled in error.

38 MSD estimates the retrospective back-payments will affect around 350 clients, with an upper limit total cost of around \$350,000. The cost of these retrospective payments of other benefits will be met within the existing baseline of the relevant Benefit or Related Expense appropriations in Vote Social Development.

ii) We are proposing that retrospective payments are exempted from means testing for 12 months

39 In some cases, retrospective payments (of RCS and other social security assistance) arising from reviews could be a significant sum which would become a cash asset for assessing entitlements for social security benefit and RCS purposes. Recipients of these payments may also derive income such as interest payments from the cash asset over time once they receive them.

40 The retrospective payments arising from the historical reviews could affect their social security assistance entitlements in various ways:

- i. Where a client receives a retrospective payment, MSD would need to consider any income that could be earned from that lump sum. This would mean that in some circumstances their entitlement to RCS could decrease and they would then be required to pay more towards the cost of their residential care on an ongoing basis.
- ii. If a client who receives a retrospective payment has a partner in the community, the amount received (and any income earned from it) could end up affecting the partner's eligibility for RCS when they enter care.
- iii. The retrospective payments could also affect some people's general entitlements to social security assistance. In particular, if a client has a partner living in the community, it is possible that the resident's receipt of a retrospective payment, and the income that could be earned from it, could affect the community-partner's entitlement to assistance that is income or cash asset tested, including main benefits and/or supplementary support.

41

s 9(2)(h)

42 Due to differing income and asset levels of clients and the uncertainties around the likely outcomes of reviews, we cannot reliably estimate the number of clients whose assistance entitlements might be reduced. However, we estimate that the impact would be mostly minor. We expect the only significant impact would be reductions in RCS entitlements, as outlined in (i) above. In those cases, we

² The EB rate is the equivalent to the Supported Living Payment rate as a maximum.

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estimate that around 350 clients would be required to pay an additional amount, averaging around \$232 a year, towards the cost of their care due to receiving a refund.

A 12-month means test exemption would be consistent with recent precedents and the general policy principles for exemptions

- 43 There is a general framework for guiding the policy development of income and cash asset exemptions in regulations. The framework outlines certain principles to apply in cases where retrospective payments are made to ensure 'full and correct entitlement' to financial assistance. These principles reflect the approach applied in previous cases where retrospective payments have been recently made³. The framework specifies:
- MSD should seek an income and asset exemption when it would be "unfair, unreasonable or inequitable if a particular payment would adversely affect (reduce, stop or decline) a person's (or couple's) financial assistance"
 - a means test exemption for payments in compensation for clients not receiving their full and correct entitlement to financial assistance should usually apply for a period of 12 months from the date of payment. We consider this is a reasonable time period for the client to make use of the money without their entitlement to social security assistance being affected.
- 44 There are several specific income and cash asset exemptions such as for ex gratia and compensation payments. Examples include payments from the Vietnam Veterans and their Families Trust or for some former patients of Lake Alice Psychiatric Hospital.
- 45 In line with these principles, we propose that the retrospective payments arising from the retrospective reviews be exempted from the asset and income tests for RCS and other social security assistance for a person/couple for a period of 12 months.
- 46 As part of this exemption, we also propose that any gifting away of the lump sum amount during that 12-month period be treated as allowable for the purpose of assessing any entitlements. This will require a regulation change and would represent a one-off extension to the general policy framework approach outlined above and recent precedents. However, we consider it would be justified, given that this is a situation where long-term aged residential care clients or their partners will be the target group for retrospective payments so the application of 'deprivation' rules would be much more likely.
- 47 We expect the fiscal cost of the exemptions would primarily relate to RCS costs but would be minimal, amounting to around \$90,000. This cost will be met within DHB baselines (in the case of RCS means testing).

³ In particular, when exemptions to the FMA for the residential care subsidy and means testing for other social security assistance were granted for lump sum refunds made by MSD from 2016 to 2018 in compensation for IT errors in the payment system for the Accommodation Supplement (AS) [CAB-16-MIN-0460.01 refers]; clients previously receiving Special Benefit (SB) who would have been better off receiving Temporary Additional Support [SOC-17-MIN-0075 refers]; and errors in the boundary areas used for the payment of AS [SWC-18-MIN-0134 refers].

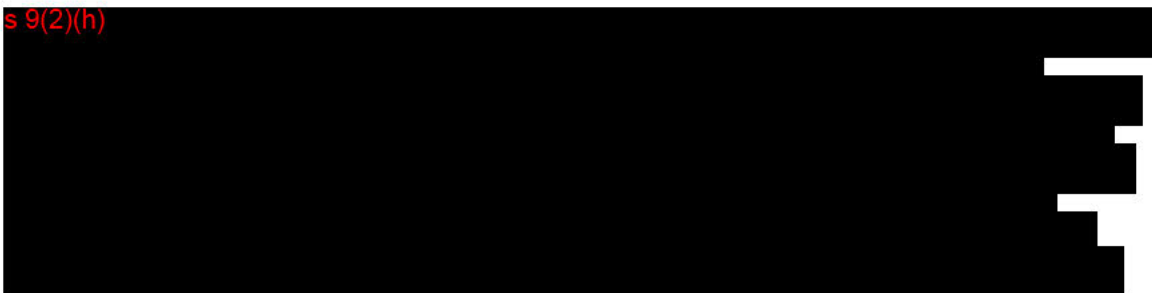
48 To bring these exemptions into effect, amendments would be required to the Social Security Regulations 2018, the Residential Care and Disability Support Services Regulations 2018 and the Ministerial Direction in relation to Special Benefit.

There are reputational and legal risks if the Court of Appeal decision is not implemented

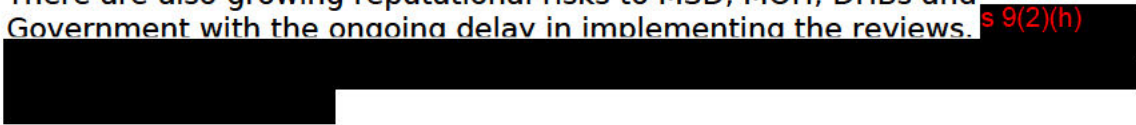
49 We consider it important that MSD's response to historical cases affected by the decision be implemented as soon as possible, and within the 2020/21 financial year. In particular:

- Retrospective implementation of the judgment should take place as soon as possible, as significant time has now elapsed since the Court of Appeal judgment in 31 May 2019.

- s 9(2)(h)



- There are also growing reputational risks to MSD, MOH, DHBs and Government with the ongoing delay in implementing the reviews. s 9(2)(h)



Implementation

50 Based on the approach outlined above, we estimate that MSD will need to write to around 2,100 current clients or estates of recently deceased clients. We estimate that there may be as many as 300 additional requests for retrospective reviews.

51 We are developing a wider strategy for notifying people of the opportunity to seek a review of their assessment. This will also provide accurate information for people who hear about it and wonder what it means for them or their older family members.

52 The strategy to reach this wider group will include:

- information for lawyers, trustee companies, accountants and financial advisors (via their professional bodies newsletters and websites)
- information for other stakeholders such as financial writers, long-term care providers, Age Concern and advocacy groups
- a printed brochure these groups can be used to help explain it to their clients/ members. This will help explain who is affected, the impact it has on FMAs (past and future), and how we are putting it right. Older people often prefer printed material, and this approach will be most useful for family or advisors

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when they are explaining things to them. Detailed information will also be provided on the Work and Income website.

- detailed information on the Work and Income website
- a web-form application for our clients/their agents/trustees/executors/lawyers to complete.

Financial implications

- 53 We are seeking funding of \$20 million and have submitted an initiative to fund retrospective payments through the Budget 2021 process. This initiative seeks \$5 million in this financial year (2020/21) and \$15 million in 2021/22.
- 54 The initiative proposes that this funding is structured as a new appropriation in Vote Social Development, with the Minister of Health assigned as the appropriation Minister, which will enable MSD to make retrospective payments directly to clients/estates.
- 55 MSD and MOH are considering what alternative funding sources are available should the initiative for Budget 2021 not be funded.
- 56 The cost of the retrospective payments of other benefits, estimated by MSD to total \$350,000, will be met from within the baseline of the relevant Benefit or Related Expense appropriations in Vote Social Development.
- 57 The cost of the 12-month means test exemptions for the retrospective RCS payments - estimated at around \$90,000 - will be met within DHB baselines (in the case of RCS means testing) and within the existing baseline of the relevant Benefits or Related Expenses appropriations within Vote Social Development (in the case of income and asset testing for other social security assistance).
- 58 The operational costs of carrying out the reviews and making the retrospective payments, including any IT and systems costs, will be met from within MSD's existing baselines.

Legislative implications

- 59 The changes in this paper require amendment to the Social Security Regulations 2018, the Residential Care and Disability Support Services Regulations 2018 and the Ministerial Direction in relation to Special Benefit.

Impact analysis

Regulatory impact statement

- 60 The Regulatory Quality Team at the Treasury has determined that the regulatory proposals in this paper are exempt from the requirement to provide a Regulatory Impact Statement on the basis that they have no or minor impacts on businesses, individuals or not for profit entities. This regulatory proposal will only be in effect for 12 months to reflect the implementation period of a Court of Appeal decision.

Population implications

61 Population implications have been identified for women and disabled people.

Population Group	How the proposal may affect this group
Women	More than two-thirds (around 68 percent) of those who live in aged residential care facilities are female. Implementing the proposals in this paper will mean that this group of clients and their families will receive the support they are, or were, entitled to receive.
Disabled people	All clients affected by the proposals in this paper have been needs assessed by a DHB as requiring long-term residential care in a rest home or hospital.

Human rights implications

62 This paper has no human rights implications.

Consultation

63 This paper was jointly drafted by MSD and MOH. The Treasury, the Department of the Prime Minister and Cabinet and the Offices for Seniors and Disability Issues were consulted.

Communications

64 A media holding statement will be prepared, and Ministers' offices will be kept closely informed at all stages.

Proactive release

65 We intend to proactively release this Cabinet paper, with redactions as appropriate in relation to legally privileged information, within standard timeframes.

Recommendations

66 It is recommended that the Committee:

- 1 **note** that in May 2019, the Court of Appeal found that some aspects of the Ministry of Social Development (MSD)'s approach to carrying out the financial means assessment (FMA) to determine a client's eligibility for the Residential Care Subsidy were inconsistent with legislation;
- 2 **note** that in December 2019, MSD began implementing the Court of Appeal decision for new clients and reviews for existing clients going forward;
- 3 **note** that MSD is now finalising preparations to implement the Court of Appeal decision retrospectively;

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- 3.1 it proposes to proactively contact around 2,100 clients or estates of deceased clients whose past FMAs may have been affected by the judgment and offer them the opportunity to have these retrospectively reviewed;
- 3.2 lump sum Residential Care Subsidy refunds will be required to be paid where these reviews find that clients have paid more towards the cost of their care than they should have, based on the Court of Appeal's judgment;
- 4 **confirm** a strategy to implement the Court of Appeal decision retrospectively and for MSD to process refunds to clients/estates directly rather than through DHBs and rest home owners;
- 5 **note** that an initiative has been submitted for Budget 2021 seeking funding of \$20 million (\$5 million in this financial year (2020/21) and \$15 million in 2021/22);
- 6 **note** that the initiative is proposed as a new appropriation in Vote Social Development, with the Minister of Health assigned as the appropriation Minister, which will enable MSD to make retrospective payments directly to clients/estates;
- 7 **note** that dependent on Budget 21 funding being available, MSD could start contacting clients and estates about retrospective reviews in April 2021;
- 8 **note** that if no Budget 2021 funding is available, then MSD and the Ministry of Health (MOH) will work to source alternative funding;
- 9 **note** that:
 - 9.1 where a review finds that under their original FMA a client was incorrectly deemed ineligible for Residential Care Subsidy, then these clients/couples (or their estates) may also be due retrospective payments of certain other entitlements
 - 9.2 MSD estimate that the cost of these retrospective payments of other benefits will total around \$350,000 – the cost of these retrospective payments of other benefits, estimated by MSD will be met within the existing baseline of the relevant Benefit or Related Expense appropriations in Vote Social Development;
- 10 **note** that the lump sum retrospective payments arising from the reviews, and/or the income derived from them, may affect clients' and/or their partners' eligibility for Residential Care Subsidy and certain forms of social security assistance going forward, or reduce the rate of payment that they receive;
- 11 **note** that repayments of social security assistance will be exempt under the generic income and cash asset exemption for the first 12 months after payment is made as provided for under the Social Security Regulations 2018;
- 12 **note** that, unless specifically exempted, the retrospective payments of Residential Care Subsidy arising from these reviews may affect clients' and/or their partners' receipt of income- and asset-tested assistance, including the Residential Care Subsidy and certain social security assistance;
- 13 **agree** to amend the Social Security Regulations 2018 and the Residential Care and Disability Support Services Regulations 2018 to exempt retrospective back-payments arising from these reviews from asset and income tests for the Residential Care Subsidy and social security assistance for a 12-month period from the date of payment;

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- 14 **note** that the Minister for Social Development and Employment also intends to amend the Ministerial Direction on Special Benefit to exempt retrospective payments of Residential Care Subsidy arising from the reviews from the cash asset and income tests for Special Benefit for a 12-month period from the date of payment;
- 15 **invite** the Minister for Social Development and Employment to instruct the Parliamentary Counsel Office to draft regulations to give effect to the decisions in recommendation 13.

Authorised for lodgment

Hon Carmel Sepuloni
Minister for Social Development and Employment

Hon Andrew Little
Minister of Health

Appendix One: The means assessment for long-term aged residential care and 'deprivation'

A person assessed as needing long-term aged residential care in a hospital or rest home may apply for the Residential Care Subsidy (RCS) to help meet the cost of their care. Eligibility for RCS is determined through an asset and income test known as the financial means assessment (FMA).

The RCS is paid directly by DHBs to the hospital or rest home and is funded from general population-based funding under Vote Health. RCS policy and funding is the portfolio responsibility of the Minister of Health.

The policy intent underlying the FMA is that the applicant should use the resources available to them before seeking support from the state. The FMA has two stages:

- An asset assessment – applicants who hold assets under a certain threshold are eligible for RCS. The threshold is currently \$236,336 and includes most assets (including the family home, unless the resident's partner lives in it⁴) with limited asset exceptions.
- An income assessment – if the applicant's assets are under the asset threshold, this assessment determines how much the applicant is required to contribute towards the cost of their care from any income they receive.

An applicant assessed as eligible to receive RCS has to pay most of their income towards the cost of their care, including their New Zealand Superannuation. They can retain a small *Personal Allowance* for their own use. The RCS paid by their DHB makes up the balance of the amount paid to the residential care provider.

An applicant assessed as not eligible to receive RCS is responsible for the cost of their care up to the 'maximum contribution' rate. The *Residential Care and Disability Support Act 2018* (the Act) requires the maximum contribution to be set equal to the price for rest home care.

As at June 2020, around 18,300 clients in aged residential care were receiving the RCS. In 2019/20, clients privately paid around \$1,100 million (GST inclusive) while DHBs paid \$1,200 million (GST exclusive) towards the cost of aged residential care.

Gifting and deprivation

The FMA would have limited effect if prospective clients were able to give away assets and/or the right to future income before entering residential care – e.g. to family members or a family trust. Accordingly, to prevent people from arranging their financial affairs in order to reduce the amount they have to contribute to their care, the Act provides MSD discretion to conduct its asset and income assessments as if clients had not 'deprived' themselves of assets and income.

Within these rules, gifting is permitted within certain allowable limits. In the period up to five years prior to the FMA applicants can gift up to \$27,000 per year without the gift being considered deprivation. Within five years, however, the allowable amount drops to \$6,500 a year, and MSD has no discretion to disregard any gifting in excess of this amount.

⁴ If the client has a partner living in the community then they have the option of *excluding* the family home and car from the asset test, which means that a *lower* asset threshold applies, currently set at \$129,423.

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The Broadbent case

Mrs Broadbent had sold assets to two family trusts in exchange for loans of fair value. She had then progressively forgiven the loans at a rate under the allowable gifting threshold of \$27,000 a year. In carrying out Mrs Broadbent's FMA, the Court of Appeal declared that MSD had incorrectly identified selling the assets to the family trusts as an act of deprivation.

They also concluded that MSD had incorrectly exercised its discretion to include in the FMA the current income (and possible notional income) of the trust as income capable of being derived from the assets "gifted" under the allowable gifting threshold.

The main elements of the Court of Appeal's decision were that:

- when an asset has been gifted unconditionally within the allowable gifting limits, any income capable of being generated from that asset has also been gifted, and therefore should not be assessed as 'deprived' income as part of the FMA. Accordingly, MSD was incorrect to include the income that could have been generated from the properties as deprived income in Mrs Broadbent's FMA.
- MSD was incorrect to find that Mrs Broadbent had deprived herself of assets, because she exchanged the assets with the family trusts for loans of equal value (i.e. she sold the assets, not gifted them). The Court noted it was possible that she had deprived herself of income by failing to receive interest on the loans to the trusts.
- MSD had also been incorrect to treat trusts' income effectively as clients' income. It is open to MSD to exercise its discretion to include deprived income in the FMA, but only where the income belongs to the client (NB: the Court of Appeal specified that the relevant gifting was Mrs Broadbent's annual forgiveness of the loans; the act of deprivation was not asking for interest to be paid on the loan).
- when exercising its discretion to include deprived income or assets in the FMA, MSD must consider whether financial resources are available to an applicant to help meet the cost of their care. If financial resources are found not to be available, an assessment of deprivation cannot be applied. The Court of Appeal considered that in a closely held family trust, trust resources are assumed to be available unless there are circumstances to demonstrate that they are not.

The scope of the appeal meant the Court of Appeal was unable to resolve the amounts that should have been regarded as deprivation in the case, so it referred the matter back to the Social Security Appeal Authority to determine.

Following the Court of Appeal's judgment, MSD chose not to appeal the judgment to the Supreme Court, on legal advice from the Crown Law Office that there was no error of law in the judgment.